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DAVID L. GARRISON
GARRISON & ASSOCIATES PS
SUITE 3300
2001 SIXTH AVENUE
SEATTLE WA 98121-2522

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OFFICE OF PETITIONS

In re Application of :
Akimoto et al. :
Application No. 10/620,879 : DECISION ON PETITION
Filed: 15 July, 2003 :
Atty Docket No. SCT105U :

This is a decision on the petition filed on 15 July, 2005, requesting that the above-identified application, including 10 sheets of drawings, be accorded a filing date of 15 July, 2003.

The petition is **DISMISSED**.

On 15 July, 2003, the application was deposited without drawings.

On 20 May, 2005, Initial Patent Examination Division mailed a Notice of Incomplete Nonprovisional Application, stating that the application had been deposited without drawings, and that application should reconsider whether drawings were necessary under 35 U.S.C. § 113 (first sentence). The Notice stated that the filing date would be the date of receipt of the missing drawings.

In response, on 15 July, 2005, the present petition was filed, accompanied by 10 sheets of drawings. Petitioners assert that the 10 sheets of drawings were present among the application papers deposited on 14 July, 2003. In support, petitioners provide affidavits from attorney William L. Haynes, and counsel's secretary, Jolene McCracken, stating that the 10 sheets of drawings were included in the application papers sent to the USPTO by USPS Express Mail on 15 July, 2003.

A review of the record reveals that no sheets of drawings are located among the application papers deposited on 15 July, 2003.

The argument and evidence supplied with the petition have been carefully considered, but are not persuasive. The USPTO has a well-established and well-publicized practice of providing a receipt for papers filed in the USPTO to any applicant desiring a receipt. The practice requires that any paper for which a receipt is desired be filed in the USPTO with a self-addressed postcard identifying the paper. A postcard receipt which itemizes and properly identifies the papers which are being filed serves as prima facie evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO. See section 503, Manual of Patent Examining Procedure (MPEP 503). Unfortunately, petitioners' postcard receipt does not bear an Office-date stamp of 15 July, 2003, from the USPTO. Rather, the postcard receipt bears an Office-date stamp of 15 July, 2005. As such, the postcard receipt does not serve as evidence that the items listed therein were received in the USPTO on 15 July, 2003. If petitioners have a copy of the postcard receipt for this application with a USPTO "Office date" stamp of 15 July, 2003, a copy of that postcard should be submitted with any renewed petition.

Additionally, petitioners should note that the Express Mail mailing label is not persuasive evidence of the receipt of 10 sheets of drawings on 15 July, 2003, because the other application papers filed by Express Mail were received on 15 July, 2003. Where there is a dispute as to the contents of correspondence submitted to the Office an applicant may not rely upon the provisions of 37 CFR 1.10(e) to establish what documents and or fees were filed in the Office with such correspondence.¹ A petition under 37 CFR 1.10 is therefore inappropriate in the present case. A petition under 37 CFR 1.10(e) is only appropriate where the correspondence was sent by Express Mail but nothing was received by the Office.

Lastly, the declarations included in the petition are not persuasive. The statements were made almost two (2) years after the events in question and recite personal remembrances of the preparation and filing of the application with the PTO. The application does not appear to be unusual and it is not understood why the filing of this particular application would stand out in such detail in the affiant's memory, particularly in view of the fact that affiants prepared and mailed similar papers to the PTO on a routine, daily basis.

¹ MPEP 513.

Nevertheless, it has been PTO practice to treat an application that contains at least one process or method claim as an application for which a drawing is not necessary for an understanding of the invention under 35 U.S.C. 113 (first sentence).² A review of the record reveals that Claim 1 is a method claim. Therefore, the present application is deemed to be an application which does not require a drawing for an understanding of the invention. Accordingly, the application, as filed, is entitled to a filing date.

Since the petition was necessitated by an error on the part of the USPTO, the petition fee submitted with the present petition is unnecessary and will be credited to counsel's deposit account, No. 50-0684, as authorized in the present petition.

The "Notice of Incomplete Nonprovisional Application" mailed on 20 May, 2005, was sent in error and is hereby vacated.

The application will be processed and examined using the papers filed on 15 July, 2003. The copy of 10 sheets of drawings filed with the present petition will not be used for processing or examination, but will be retained in the application file.

Petitioners may wish to file the drawings as a preliminary amendment. If the drawings are filed as a preliminary amendment, the amendment will be reviewed by the examiner for new matter.

The application is being referred to Initial Patent Examination Division for further processing with a filing date of 15 July, 2003, using only the application papers filed on that date.

Telephone inquiries should be directed to the undersigned at 571-272-3231.



Douglas I. Wood
Senior Petitions Attorney
Office of Petitions

² MPEP 601.01(f).